

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

J. H. BERRA CONSTRUCTION CO., INC.)	
)	
Appellant,)	Appeal No. ED 84012
)	
vs.)	
)	
RANDY HOLMAN, ASSESSOR)	
)	
JEFFERSON COUNTY, MISSOURI)	
)	
Respondent.)	

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
TWENTY-THIRD JUDICIAL CIRCUIT
DIVISION III
HONORABLE M. EDWARD WILLIAMS

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This case involves an appeal of a judgment of the Jefferson County Circuit Court affirming the decision of the State Tax Commission (“Commission”) that Appellant’s construction equipment was situated in Jefferson County, Missouri, for the 2001 tax year and therefore subject to assessment of personal property taxes in that county

The issue on appeal is whether competent and substantial evidence supported the Commission’s finding that Appellant’s construction equipment was “situated” within Jefferson County as provided in § 137.095.1 RSMo., or whether said decision was arbitrary, capricious, unreasonable, unlawful, or in excess of the Commission’s jurisdiction.

To the extent that Appellant seeks to have this Court determine whether the Commission properly interpreted the statute and the definition of “situated”, this matter falls within the exclusive jurisdiction of the Missouri Supreme Court as provided by Article V, § 3 of the Constitution of the State of Missouri and therefore should be transferred.

STATEMENT OF FACTS

This matter arises from an assessment of certain personal property owned by Appellant, J.H. Berra Construction Co., Inc. (“Berra”), made by Respondent, Randy Holman, in his capacity as Assessor for Jefferson County, Missouri (“the Assessor”) for the tax date of January 1, 2001 (2001 tax year). Berra is a Missouri corporation with an office building and supply yard located in St. Louis County, Missouri. Berra is a company involved in heavy construction projects throughout Eastern Missouri and Southern Illinois devoted mainly to the construction of highways, sewers, water mains, and grading. Due to the nature of its business, Berra owns and operates a number of large pieces of construction equipment. Among these are bulldozers, earth-movers, drills, and paving equipment, many of which are so large they must be disassembled to move or require permits for moving oversized and overweight loads (II LF 248).

During the tax years 2000 and 2001, Berra was involved in a number of construction projects in Jefferson County. Among these were the construction of sanitary and storm sewers, water mains, and site grading at three residential subdivision projects known as Seckman Lakes, Arrow Ridge, and Romaine Bluffs (II LF 244). Additionally, Berra was awarded a contract worth \$17,841,000 to build approximately 4.337 kilometers of a new section of Missouri State Highway 21 (“Highway 21”), with the entirety of the project located within Jefferson County (I LF 95). This was a large scale project that required not only the construction of four lanes of divided highway but, as Mr. John H. Berra, Jr.,

President and Chief Operating Officer of Appellant corporation, admitted in his testimony, the project involved the “moving of mountains”, the “filling of valleys”, and the construction of two bridges.

Procedurally, this matter began with Berra appealing the original assessment made by the Assessor to the Jefferson County Board of Equalization. No complaint has ever been made by Appellant as to the amount of the valuation on said assessment, and that is not at issue here. The Board of Equalization refused to change the findings of the Assessor that the original assessment was proper (I LF 32). Berra then filed for review of the assessment by the Missouri State Tax Commission (“Commission”). This led to the parties participating in a hearing before a hearing officer of the Commission, who affirmed the findings of the Assessor’s assessment as sustained by the Board of Equalization (I LF 7). Following the Commission’s order denying Berra’s application for review of the decision, Berra filed for judicial review in the Circuit Court of Jefferson County. Judge M. Edward Williams upheld the Commission’s findings (I LF 23). This appeal follows.

Berra has contended throughout this process that the Assessor was without authority to tax Berra’s heavy equipment located within Jefferson County because the property was not “situated” in Jefferson County pursuant to § 137.095.1 RSMo. In making this assertion to the Commission, Berra pointed out that they have offices in St. Louis County. Along with an actual office building, the site

includes a maintenance shop, fuel depot, storage yard for both material and equipment, and a concrete plant. Respondent has never disputed this assertion.

The parties disagree on the status of certain heavy construction equipment which was located in Jefferson County. Berra submitted its Exhibit B (I LF 86) which it claimed was all of the pieces of personal property which were located in Jefferson County on the tax date of January 1, 2001. It lists forty two (42) pieces of construction equipment that were at Appellant's construction sites in Jefferson County. In addition, Berra submitted Exhibits G (I LF 152), H (I LF 166), I (I LF 174), and J (II LF 180), which were identified as "usage detail reports" that purported to show the periods of time each piece of equipment identified in Exhibit B was employed on projects in Jefferson County for the period between November 2000 and November 2001. Berra also submitted Exhibit M (II LF 254) which is a summary of the usage detail reports that Appellant claimed showed how many days each piece of equipment was in Jefferson County.

According to Exhibit M, five (5) of the thirty eight (38) pieces of heavy construction equipment identified in the usage detail reports spent as much as six months continuously on Berra's job sites in Jefferson County (II LF 235). However, Exhibit M only details how long those pieces of equipment were on the job sites they were at as of January 1, 2001. It does not take into account how long each piece of equipment may have been at other job sites in Jefferson County either before or after January 1, 2001. For example, Exhibit M shows that items numbers 363, 383, and 395 all were at the Romaine Springs Estate project prior to

arriving at the Highway 21 project (II LF 234). Romaine Springs Estates, according to Berra's Exhibit L (II LF 233), was also located in Jefferson County. The same is true for other pieces of machinery of Appellant, including items numbers 95, 418, and 555 (II LF 234-235).

Careful examination of the usage detail reports reveals that other pieces of equipment spent a significant amount of time in Jefferson County during the tax years 2000 and 2001, even though the number of consecutive days they were in the county before and after January 1, 2001 appear somewhat insignificant. As an example, item number 209, which Berra identifies as having been in Jefferson County for only twenty eight (28) days (II LF 28), was actually in Jefferson County for almost an entire year according to the usage detail report submitted by Berra (II LF 194). This particular piece of equipment, identified as a Komatsu PC 1000SE Excavator with an acquisition cost of \$218,000 (II LF 372), was brought to the Highway 21 job site sometime after December 12, 2000, and then taken to the site identified as Gravois Bluffs located in St. Louis County (II LF 232) on January 16, 2001 (II LF 194). It then went back and forth between the Gravois Bluffs site and the Highway 21 site until January 30, 2001, where it remained until the last date of the usage detail report, November 27, 2001 (II LF 194-195). Numerous other examples of similar situations exists throughout the usage detail reports, including items numbers 560, 963, 92, 95, 96, 208, 68, 363, 383, 395, 414, 415, 418, 419, and 425.

Berra claims that one of the functions of its St. Louis County facility is to serve as a storage yard for equipment when it is not in use at its various job sites (II LF 243). However, Berra admitted that because of the size of its equipment, the time and cost associated with moving the equipment, the permits for oversized or overweight hauling that must be obtained to move the equipment, and the necessity that some of the equipment must be dismantled in order to be moved, the equipment would sometimes be stored at job sites until it was put to use (II LF 248). This point was illustrated by the testimony of Mr. Berra, who admitted that four pieces of paving equipment which were not discussed in the usage detail reports were moved to the Highway 21 job site in November 2000, but were not put into use until March 2001 (II LF 245). These items were not moved from Jefferson County until April, 2001, six months after being brought into the County (II LF 245). There is no indication as to whether they ever were returned to the County, as no usage detail reports were produced for this equipment. The Highway 21 project, however, was only 14.6% complete as of January 15, 2001 (I LF 136) and the project was originally estimated to take eight hundred eighty two (882) calendar days covering July 3, 2000 through December 1, 2002 (II LF 250).

Berra has maintained that all of their personal property, including all of its heavy construction equipment, was situated in St. Louis County, and therefore was only subject to assessment for personal property tax purposes there. Berra filed only a single personal property tax return on January 1, 2001, that being in St. Louis County (I LF 54). That return asserted that Berra then had personal

property with a total acquisition cost of 6.38 million (\$6,380,000) dollars (I LF 57). However, Respondent's Exhibit 5 (II LF 371) establishes that Berra filed a list of its personal property with the Assessor showing property situated in Jefferson County alone on the tax date of January 1, 2002 with a total acquisition cost of over 6.8 million (\$6,800,000) dollars. None of this property had an acquisition date any later than the year 2000, meaning that it was all purchased by Berra prior to the filing of its 2001 personal property tax return in St. Louis County.

Michael Boynton, the Director of Assessments for the Jefferson County Assessor's Office, prepared a list of personal property he believed was owned by Berra which was submitted as Exhibit 2 (II LF 264) that was used in determining the amount of the original assessment. Mr. Boynton testified that he had observed a number of pieces of Berra's equipment located throughout the Jefferson County area for an extended period of time (II LF 72 – 77, 367-368). Mr. Boynton asserted that, because of the length of time he observed many of these pieces of equipment in Jefferson County, he felt that the equipment had become "situated" in Jefferson County and were subject to personal property tax within the county. (II LF 368-370). This assertion was based not only on his personal observations, but also on the field notes and photographs of others in the Jefferson County Assessor's Office (II LF 367), as well as excavation diaries from the Missouri Department of Transportation (II LF 368) and documents provided by Berra and the St. Louis County Assessor's Office (II LF 368).

Respondent's Exhibit 2 itemizes sixty six (66) items of heavy construction equipment and machinery belonging to Berra that were assessed for property tax purposes by the Assessor (II LF 264). Included among these items are a number of pieces of heavy machinery found to be at one of six sights located throughout Jefferson County between January and July 2001. In addition, other items such as cranes, trailers, generators, and lights were also documented as being present at the sites (II LF 264-265).

Mr. Boynton's testimony was that over the course of months and even years, he and other members of his office observed the presence of Berra construction equipment at job sites throughout Jefferson County (II LF 368-370). Mr. Boynton stated that he, personally, regularly drove by the Highway 21 job site over the course of two years and observed Berra's machinery and heavy equipment continuously at the site (I LF 76).

Mr. Boynton had no way of identifying what pieces of equipment he observed during his visits to Berra's various job sites other than to try and note their make and model. He did not have access to serial numbers (II LF 74) or to the item numbers that Berra kept and assigned to each piece of equipment. However, a number of the pieces of equipment identified by make and model number in Exhibit 2 (II LF 264) match the make and model numbers of items identified by Berra in Exhibit B (I LF 86). Other items appear to be similar, although because of differences in the way items may be described it is impossible

to make a true comparison. However, Berra has at no time disputed that the items observed by Mr. Boynton were ever present at the various job sites.

One of the requirements of the Highway 21 project was that Berra maintain a trailer for use as an office at the job site for the Missouri Highway Transportation Commission (II LF 251). Mr. Boynton's report indicates that there were actually two trailers on the site, along with at least one generator (II LF 264-265). His report indicates that there were trailers at four of the five other sites he listed in Exhibit 2 (II LF 264-265). Despite the requirement of the contract that a trailer be provided (II LF 251), Berra nowhere in Exhibit B lists the existence of any trailer at the Highway 21 site, nor any trailers at any of their project sites.

POINT RELIED ON

- I. The State Tax Commission did not err in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under § 536.140.2 RSMo., the Commission's decision is authorized by law and supported by competent and substantial evidence upon the whole record in that:**
- A. The construction equipment had more than a temporary presence and was in fact situated in Jefferson County on January 1, 2001, within the meaning of section § 137.095.1 RSMo.; and,**
- B. The Commission utilized the correct standard under the law in its determination that Appellant's construction equipment was "situated" in Jefferson County within the meaning of § 137.095.1 RSMo. by virtue of having a more or less permanent location in Jefferson County, and that the Commission's examining whether Appellant's construction equipment was "continually and habitually employed" in another county was proper within the context of determining if the construction equipment was situated within Jefferson County.**

Buchanan County v. State Tax Commission, 407 S.W.2d 910 (Mo. 1966)

Griggsby Construction Co. v. Freeman, 108 La. 435, 32 So. 399 (La. 1902)

Bi Go Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo.banc 1992)

Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S. Ct. 152 78
L.Ed. 238 (1933)

Article V, Section 3

Section 137.095 RSMo.

Section 536.140.2 RSMo.

ARGUMENT

Standard of Review

This Court is reviewing the decision by the State Tax Commission (“Commission”), as affirmed by the Circuit Court of Jefferson County. As such, this Court reviews the decision of the Commission and not that of the trial court. F.X. Daly v. P.D. George Company, 77 S.W.3d 645, 648 (Mo.App. 2002). The Court must determine whether the decision of the Commission is supported by “competent and substantial evidence upon the whole record, or whether it was arbitrary, capricious, unreasonable, unlawful, or in excess of the Commission’s jurisdiction.” Id. at 648. The evidence is to be considered in the light most favorable to the Commission’s decision, and if the evidence could support two opposed findings, then this Court is bound by the Commission’s decision. Id. at 648

The issue presented in this appeal involves whether competent and substantial evidence supported the Commission’s finding that certain heavy construction equipment owned by Appellant was “situated” in Jefferson County in accordance with § 137.095.1 RSMo. Therefore, it is purely a question of fact. Appellant contends that the Commission incorrectly applied the law to the facts, and that this Court should resolve the factual issues involved in this case. (App. Brief p.15) Even if Appellant’s contention is true, the Supreme Court has stated that when resolving such factual issues, the Court should “give due weight to the opportunity of the agency to observe the witnesses, and to the expertness and

experience of the particular agency. Evangelical Retirement Homes of Greater St. Louis, Inc. v. State Tax Commission of Missouri, 669 S.W.2d 548, 552 (Mo. banc 1984).

Howe ver, should this Court determine that the issue presented herein is the Commission’s interpretation of the term “situated” as used in § 137.095.1 RSMo., then Respondent submits that this matter falls under the exclusive jurisdiction of the Supreme Court of Missouri. Article V, § 3 of the Constitution of the State of Missouri provides that the Supreme Court has exclusive jurisdiction in all cases involving the “construction of the revenue laws of this state.” If, as Appellant urges, the issue in this matter is one of interpretation by the Commission, and is purely a matter of law, then the Supreme Court should have exclusive jurisdiction to review this matter.

For this matter to fall within the exclusive jurisdiction of the Supreme Court, the matter must involve “(1) construction (2) of the revenue laws (3) of this state.” Maryville Properties, L.P. v. Nelson, 83 S.W.3d 608, 610 (Mo.App. 2002). “Construction”, as used in this context, differs from “application”, and “if the Supreme Court has already decided an issue, the Court of Appeals applies the Supreme Court precedent.” Id. at 610. If there is no precedent to apply, then construction is involved. Id. at 610. The precedents which have been established by the Supreme Court were correctly applied by the Commission and, if this matter remains in the jurisdiction of this Court, the correct standard to apply is whether there was competent and substantial evidence to support the decision of

the Commission. However, to the extent that this specific factual situation has not been addressed directly by the Supreme Court, this matter may fall within its exclusive jurisdiction.

I. The State Tax Commission did not err in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under §536.140.2 RSMo., the Commission's decision is authorized by law and supported by competent and substantial evidence upon the whole record and not arbitrary, capricious or unreasonable in that:

A. The construction equipment had more than a temporary presence and was in fact situated in Jefferson County on January 1, 2001, within the meaning of section § 137.095.1.

Section 536.140.2 RSMo. provides that, when a case heard by an administrative agency comes before a court for judicial review, the court's inquiry may include whether the decision of the agency was "unsupported by competent and substantial evidence upon the whole of the record" § 536.140.2(3) or "is arbitrary, capricious or unreasonable" § 536.140.2(6).

The evidence established that Appellant was a contractor engaged in the business of heavy construction projects, including the construction of highways, sewers, water mains, and grading. Appellant maintained a business office in St. Louis County, Missouri, which included Berra's administrative office, maintenance shop, fuel depot, storage yard, and concrete plant. However, Berra's business involves construction projects throughout the Metropolitan St. Louis area

and beyond, including several projects in Jefferson County, Missouri which were ongoing during tax years 2000 and 2001. By their nature, Berra's construction projects are long term projects, lasting months or even years, worth millions of dollars, and requiring Berra to own, operate, and maintain large construction equipment and machinery, such as bulldozers, drills, earthmovers, and paving equipment.

The assessment of personal property is governed by §137.075 through §137.286 RSMo. Appellant contends that the Commission erred in finding that, pursuant to §137.095.1 RSMo, certain items of personal property belonging to Berra were "situated" within Jefferson County on the relevant tax date of January 1, 2001. In support of this contention, Appellant correctly asserts that "'situated' as used in a statute authorizing or directing the taxation of property, connotes a more or less permanent location or situs." Buchanan County v. State Tax Commission, 407 S.W.2d 910, 914 (Mo. 1966). "Situated" requires more than finding the property to be in a location on a temporary basis. Id.

Other states have examined this issue under similar circumstances. For example, in Griggsby Construction Co. v. Freeman, 108 La. 435, 32 So. 399, (La. 1902) The Louisiana Supreme Court found that a construction company which brought in equipment from out of state was subject to personal property taxes within the state. Id. The construction company was hired for the purpose of doing grading work for a rail line through Nachitoches County, Louisiana. Id. at 437,

399. As part of this project, the construction company brought in all of the equipment it would need in constructing such a project. Id.

The Griggsby Court held that if property was enjoying the protection of the laws of the state, then it should also be taxed as a cost for that protection. Id. at 440, 401. It further declared that if property were to be in the state for some period of time, then it would be unfair for it to reap the benefits of the state's protection without paying any taxes for it, but, if the property was in transport through the state or only going to be there a short time, it would be unjust to require taxes to be paid as if it had received substantial protection. Id.

In examining whether the construction company's property was subject to taxation by the county, the Griggsby Court stated that the determination as to what constituted enough time within a jurisdiction to acquire permanency was a question of fact and not of law. Id. The Court further stated that, at the time, no set formula or rule had been established, and that the nature of the question may not lend itself to the formation of a rule. Id. Even now, one hundred years later, it seems no formula has been established.

The Griggsby Court found that the property was subject to taxation in Natchitoches County. Id. at 442, 401. The reasoning was that the property was no longer in transition, but was in use in the county and was likely to be used for a substantial period of time. Id. The Court could find no distinction between the property of the construction company and the property of the other persons living in the county. Id. As the Court stated, the only distinction that could be made was

that the construction company's property was that the owner of the property had an intention of removing it at some unascertainable time in the distant future, perhaps as long as a year. Id.

Similarly, the Supreme Court of Utah has found that construction equipment, brought into the state by a foreign corporation for an indefinite period of time, was taxable in the county it was used. Hamilton & Gleason Co. v. Emery County, 285 P. 1006 (Utah 1930). In this instance, the construction company brought its equipment into the state sometime in 1925 for work on a project that was completed in early 1926. Id. at 1007. It asserted that, since the equipment was only there for a temporary purpose, it should not be subject to taxation. Id.

The Hamilton Court framed the question as whether or not the property had acquired a taxable situs in the state of Utah. Id. In its analysis, the Court stated the proposition that the property was not taxable unless it was permanently in Utah, but that the word permanent could be misleading, as it means only that it is in a permanent location for the time being. Id. This Court also stated that it is impossible to fix a certain length of time or degree of permanency required before property acquires a new taxable situs. Id. The Hamilton Court ultimately decided that the property was taxable in Utah. Id.

These cases are similar to the situation at hand. The question posed to the Commission was whether Berra's construction equipment that was taxed by the Assessor had sufficient contact with Jefferson County to become situated in the

County. The Commission, after hearing the evidence presented, concluded that there was sufficient contact to support such a claim.

Berra admits to having forty two (42) pieces of machinery in Jefferson County on January 1, 2001. (Exhibit B, I LF 86) However, it contends that none of the pieces of equipment found in Jefferson County was there for longer than 167 working days spanning January 1, 2001, and only one piece of equipment was located there that long. (Ap. Brief p. 22). According to Appellant, no other piece of equipment was at a job site for more than two months. However, Respondent submits that this is a mischaracterization of the evidence that Berra itself presented.

Berra submitted Exhibits G (I LF 152), H (I LF 166), I (I LF 174) and J (II LF 180), which were “usage detail reports”, intended to show how long each piece of equipment was at a particular job site on January 1, 2001. Exhibit M (II LF 254) was submitted as a summary of the usage detail reports that showed not only how long each piece of equipment was worked at a job site, but how many days it was at a site. According to Exhibit M, a number of pieces of equipment were present at the Highway 21 job site for over two months, some of them in excess of six months. For example, item number 506 was on the job site for 70 days, item number 341 for 70 days, item number 359 for 224 days, item number 363 for 189 days, item number 383 for 254 days, item number 395 for 64 days, item number 414 for 196 days, item number 415 for 154 days, item number 419 for 175 days, and item number 425 for 239 days.

Continuing examination of the usage detail reports further reveals that, while the dates listed in Exhibit M are correct on their surface, careful examination of the reports themselves reveals additional information. These reports span the time period from November, 2000 through November, 2001, and are said to include all of the work performed by each piece of equipment over that time. However, with many pieces of equipment, the job site it was moved from immediately preceding the January 1, 2001 job site or immediately after was another job site in Jefferson County. Additionally, pieces of equipment were moved out of Jefferson County only to be returned in short order, either to the original job site or to another one located in Jefferson County. By their own records, sixteen of the thirty eight pieces of equipment identified by Berra in the usage detail reports spent over six months in Jefferson County from November, 2000 through November 2001.

In addition, John H. Berra, Jr., President and Chief Operating Officer of Appellant corporation, testified that there were four pieces of large paving equipment located at the Highway 21 project site on January 1, 2001 that were not in the usage detail reports (II LF 245). By his own testimony, he states that these four pieces were brought to the work site in November, 2000, where they all sat through the winter and were finally put into use in March 2001. All of the pieces of paving equipment remained at the site until April, 2001. There is no indication given whether they ever returned to the project site, although by the time they were transferred, they had spent six months in Jefferson County.

It is worth noting at this point that, while Berra has always maintained that its headquarters is in St. Louis County, Missouri, and that its headquarters includes an equipment storage facility, much of the evidence produced by Berra indicates that it made use of its job sites as storage facilities as well. Mr. Berra's own testimony was that moving the equipment is sometimes very expensive and time consuming, and that "equipment is sometimes parked on a particular site and not worked either because it is awaiting its work task or because of weather prohibitions, particularly in the winter months spanning January 1, 2001." (II LF 248)

Evidence offered by Respondent was that even more of Berra's equipment was "situated" within Jefferson County, and thus subject to the property tax. Michael Boynton, Director of Assessments for the Jefferson County Assessor's Office, testified that he had seen Berra equipment at different locations in the county for years, particularly at the Highway 21 job site, which he drove by on a regular basis (I LF 76). He observed pieces of large construction equipment and heavy machinery there for extended periods of time, although he could not say with certainty that any one piece of equipment was the same piece he observed at a job site months earlier, as this type of equipment is not identified by license plates, but rather by serial numbers. He also stated that he observed equipment that was not even in working condition with front ends off and motors removed, either being repaired on the site or having parts repaired off site and brought back out to be replaced (I LF 75-76).

Mr. Boynton and his associates made a number of visits to the various Berra sites throughout Jefferson County. They logged equipment and took photographs of items that they found. Given the circumstances and the limited resources that were available to him, Mr. Boynton was able to put together a list of sixty six (66) items he believed had acquired a permanency in Jefferson County and were thus subject to personal property taxation (Exhibit 2, II LF 264).

Under the guidance of the cases presented earlier, the Commission was well within its authority in upholding the assessment. While the Appellant was a corporation that maintained an office and other facilities outside of Jefferson County, this is not the measure as to what constitutes a taxable situs for personal property. Bi Go Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo.banc 1992). The nature of Berra's work and the projects they were engaged in, caused them to spend considerable time and resources in Jefferson County, keeping heavy construction equipment at various job sites for extended periods of time, thus becoming situated in Jefferson County. The Highway 21 project alone was scheduled to run more than two years beginning in 2000 and extending into late 2002. The existence of the equipment in Jefferson County was not permanent in the sense that it would remain there forever and never be moved. That, however, is not the standard. The measure is whether or not the property has been there long enough to establish a taxable situs. As the cases illustrated, there is no bright line rule as to what period of time this is.

One measure espoused was whether the property was there long enough to derive a benefit from the services provided by the County. As the Commission pointed out, Berra's equipment most certainly derived such a benefit. While none may have ever been needed, and no evidence was introduced that it was, Berra surely had an expectation that Jefferson County would have provided police, fire, ambulance, or other emergency or non emergency services had the need arisen, and Jefferson County surely would have provided those services.

Appellant relies heavily upon the case of George M. Brewster & Son v. Borough of Bogota, 20 N.J.Super. 487, 90 A.2d 58 (1952) to support their position. However, that case is distinguishable from the facts at hand. First, the New Jersey Supreme Court found that there was a presumption that personal property has, as a tax situs, the same as that of its owner. Id. at 493, 60. As the Bi Go Court held, this is an ancient fiction no longer recognized in Missouri and has given way to the proposition that personal property is only taxable where the property has an actual physical situs. Bi Go *infra* at 918.

Secondly, the facts in Brewster are different from the facts in the present case. In Brewster, there was a single construction project that involved a number of different taxing districts, as opposed to this case where there are multiple construction projects but only one taxing authority involved. Brewster at 490, 59. Additionally, one of the towns involved in the issue asserted that the construction equipment had become situated within their jurisdiction, and was thus subject to taxation by the town. Id. at 496, 62. However, no evidence was presented

showing that any of the specific pieces of construction equipment were located within the jurisdiction of the town for any length of time beyond the taxing date. Id. The town relied on the fact that the contract to build the highway in question was for a period of over one year to support its claim. Id. In the present instance, ample evidence was presented by both parties concerning specific pieces of large construction equipment that is sufficient to support the finding that the equipment became situated in Jefferson County.

There was sufficient competent and substantial evidence, as taken in light most favorable to the ruling of the Commission, to support the Commission's decision, and ample evidence provided to demonstrate that the Commission's decision was not arbitrary, capricious, or unreasonable, and the assessment made by Respondent should be upheld.

B. The Commission utilized the correct standard under the law in its determination that Appellant's construction equipment was "situated" in Jefferson County within the meaning of § 137.095.1 RSMo. by virtue of having a permanent location in Jefferson County, and that the Commission's examining whether or not Appellant's construction equipment was "continually and habitually employed" in another county was proper within the context of determining whether the construction equipment was situated within Jefferson County.

Appellant complains that the Commission used an incorrect standard in determining whether Berra's construction equipment was "situated" in Jefferson County on January 1, 2001, as the term is used in § 137.095 RSMo. This contention is based upon the language in the Commission's decision in which the Commission examined whether the equipment in question was "continually or habitually employed" in another county other than Jefferson County. Berra argues that the standard is not "continually or habitually employed" but rather "situated". However, the Commission did not use the "continually or habitually employed" test to determine whether the property was subject to property tax, but instead it was used to determine whether the property was "situated" in Jefferson County.

Appellant correctly cites the finding of the case of Buchanan County v. State Tax Commission, 407 S.W.2d 910 (Mo. 1966) for the proposition that, in order to be subject to taxation under § 137.095 RSMo., personal property must be situated in the county in which the tax is sought. The Court stated that this was different than saying the property was taxable in the county in which it was physically present. Id. at 914. Situated implies more than a temporary presence. Id. According to the Court, "situated" "connotes a more or less permanent location or situs." Id.

However, the Court in Buchanan County goes no further in explaining how to make a determination as to how "situated" is to be determined. The Commission thus looked to the case of Bi Go Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo.banc 1992) for guidance. The Court in Bi Go was trying to determine

whether Missouri, and specifically, St. Louis County, had the authority to levy an ad valorem property tax on an airplane owned by a New Hampshire corporation that spent a considerable amount of time in Missouri. Id.

Appellant would have you believe that because the Bi Go case involves issues of apportioning taxes and interstate commerce, it is of no precedential value to the present situation. This is incorrect. At issue was whether the airplane owned by the New Hampshire corporation had a tax situs in Missouri; that is, due to the fact the corporation was based in another state, did Missouri have the power to issue a tax. Id. The Court examined a number of cases from around the country that dealt with this issue, including the decision of the United States Supreme Court in Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S.Ct. 152 78 L.Ed. 238 (1933). Bi Go, supra. at 918.

The Supreme Court, in Johnson Oil, used the analysis as to whether the property in question was “habitually or continuously employed within the state.” Bi Go, supra. at 918 (citing Johnson Oil, supra. at 162, S.Ct. at 153.) This analysis was used to determine whether the home state was the tax situs, or whether another state had acquired the situs due to the property’s contacts with that state. Bi Go, at 918. In addition, the Court in Bi Go stated that it must be determined whether the property in question is “deriving substantial ‘opportunities, benefits and protections’” from a situs through “habitual or continuous use” within the situs. Id. at 920.

The Missouri Supreme Court used similar language in Peabody Coal Company v. State Tax Commission, 731 S.W.2d 837 (Mo.banc. 837). In another case involving interstate commerce and the taxation of property of a foreign corporation, the Court stated that in determining a property's actual tax situs, the Court must ascertain whether there is a continuous presence in the situs. Id. at 839.

The Commission was correct in applying the above standards to the present case. Bi Go involved a corporation which had its headquarters and offices located in another jurisdiction, but which owned tangible personal property subject to taxation. A determination had to be made as to where that property had obtained situs for taxation purposes. The Bi Go Court determined that substantial evidence had been presented indicating that the property in question had sufficient contact with a taxing jurisdiction other than where the corporation's offices were located to give that property a different situs than that of the corporation. The use by the Commission of the standard examining whether the property was "habitually or continuously" found within Jefferson County was proper. The Commission used this as a method of determining whether or not the property had acquired a situs in Jefferson County, not as the standard itself.

The Commission throughout used "situated" as the standard by which it made its decision. As noted in its decision, the Commission pointed out that it issued an order dated July 9, 2002 in which it advised the parties "to present factual evidence about the personal property that will inform this Commission in

rendering a decision about where the property was legally “situated” on the tax day....” (I LF 13). This position did not change after the hearing.

CONCLUSION

For the reasons stated herein, the Court of Appeals should uphold the decision of the State Tax Commission and sustain the assessment of Appellant's personal property taxes for the 2001 tax year.

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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word by which it was prepared, contains 7,337 words, exclusive of the cover, this Certificate of Compliance, the signature block and the Appendix.

The undersigned further certifies that the diskette filed herewith containing the Respondent's Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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